No. 83-125

In the Supreme Court of the United States

OCTOBER TERM, 1983

PENNTECH PAPERS, INC. AND T.P. PROPERTY CORPORATION, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether a finding in a proceeding under Section 301 of the Labor Management Relations Act, 29 U.S.C. 185, that parent corporations were not bound by a collective bargaining agreement (to which they were not signatories) between their subsidiary corporation and several unions precluded the Board from finding that the parent corporations violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by refusing to bargain with the unions about the effects of the corporations' decision to close the subsidiary's plant.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 706 F.2d 18. The decision and order of the National Labor Relations Board (Pet. App. 20a-97a) are reported at 263 N.L.R.B. No. 33.

JURISDICTION

The judgment of the court of appeals (Pet. App. 19a) was entered on April 26, 1983. The petition for a writ of certiorari was filed on July 25, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), and Section 301 of the Labor Management Relations Act, 29 U.S.C. 185, are set forth at pages 2-3 of the petition.

STATEMENT

1. Petitioner Penntech Papers, Inc. (Penntech) operates a paper mill in Johnsonburg, Pennsylvania. In 1975, Penntech organized petitioner T.P. Property Corporation (T.P.) for the purpose of acquiring property for Penntech. T.P. has no existence apart from Penntech, all of its officers being Penntech's officers, and its headquarters being Penntech's headquarters. Pet. App. 3a, 73a-74a; A. 144-146.[1]

Kennebec River Pulp and Paper Company (Kennebec) operated a paper mill in Madison, Maine, which it closed in December 1975. Shortly thereafter, petitioners entered into negotiations to purchase Kennebec. As a condition precedent to the purchase—which was intended to revive the mill—petitioners required Kennebec to negotiate certain changes in the collective bargaining agreement it had with several unions.[2] The revised collective bargaining agreement between Kennebec and the Unions was executed on March 1, 1976. Pet. App. 3a-4a, 43a-44a, 77a-79a; A. 147-148, 150-154, 466-472, 592-593, 656-660, 671-672, 756-759.

On March 3, 1976, T.P. formally acquired all of Kennebec's stock and made monetary advances to Kennebec for which Kennebec executed demand notes secured by Kennebec property. Upon the acquisition, petitioners' president and director, John Leslie, and petitioners' vice president, William Ford, were named two of Kennebec's three directors; within a year, Leslie and Ford were Kennebec's only directors. Kennebec's new officers included Allen Nadeau, a Penntech vice president, as president; Ford as vice president; and Steven Bittel, Penntech controller, as corporate

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[1] "A." refers to the joint appendix in the court of appeals.

[2] United Paperworkers International Union, Locals 36 and 73, International Brotherhood of Firemen & Oilers, Local 270, and International Brotherhood of Machinists & Aerospace Workers, Local 559, AFL-CIO.

controller. Pet. App. 3a-4a, 43a-44a, 74a-75a; A. 145-147, 153, 401, 862-864.

Kennebec resumed operations under its new ownership and management within a few weeks. Thereafter, all sales of Kennebec's products were made through Penntech; all customer orders were taken by Penntech; and final authority for the scheduling of production was vested in Penntech's personnel at Johnsonburg. Similarly, Penntech did all of Kennebec's purchasing and paid Kennebec's suppliers directly. Penntech financed the on-going operations at Kennebec; and Kennebec's top officials were all on Penntech's payroll and were responsible to, and subject to hire and fire by, petitioners' president, Leslie. Pet. App. 4a, 44a, 77a-78a, 80a-83a; A. 424, 704-713, 724-725, 765, 868-872, 882-884, 887, 895, 965-968, 974.

Leslie himself, while holding no formal executive position with Kennebec, followed its affairs "very closely" and was actively involved in its operations. On November 19, 1976, he convened a meeting of Kennebec department heads and union representatives and warned them that production would have to increase or the mill would not be "viable for continued operation." Pet. App. 4a, 47a-48a, 75a-76a; A. 660-661.

Production at Kennebec remained poor in January and February of 1977, and petitioners' top-level management was aware that closure was probable. On March 17, 1977, Leslie, as president of T.P., sent a letter to Kennebec noting that T.P. had demanded that Kennebec pay T.P. outstanding debts of $2,500,000 and demanding that the notes be paid immediately. Everyone in management was aware that Kennebec could not make such payment, and that the demand was a predicate to protecting T.P.'s lien interest upon closure. On March 29, 1977, Leslie ordered Kennebec's president—at that time, Bruce St. Ledger, who was on Penntech's payroll—to close the mill that day. St. Ledger

did so, and the next day petitioners began removing materials and equipment from the mill. Pet. App. 4a-5a, 17a, 48a-53a, 63a; A. 375-376, 536-537, 879-880, 940-947.

Although the closure was final and not temporary, St. Ledger—after consultation with Leslie—insisted to union representatives who were inquiring about, for example, severance pay, that the shutdown was "indefinite" and not permanent. He advised them that any further questions should be directed to Penntech's attorneys. Subsequent meetings between St. Ledger and the union representatives produced no results, but only reiteration by St. Ledger that Kennebec had not closed permanently. In fact, Kennebec's creditors foreclosed, and Kennebec never again operated the mill. Pet. App. 5a, 18a, 53a-58a, 61a-63a; A. 317-318, 448-452, 454-458, 500-502, 521-522, 574-576, 651, 1024-1025.

Respondent Unions filed suit under Section 301 of the Labor Management Relations Act, 29 U.S.C. 185, seeking to compel petitioners to arbitrate the provisions of the Unions' collective bargaining agreement with Kennebec governing vacations, pensions and severance pay in the event of a permanent closure. The district court, affirmed by the court of appeals, held that petitioners, who were not signatories to the agreement, could not be compelled to arbitrate since there was "no allegation or evidence that any fraud or misrepresentation by [petitioners] induced the [Unions] to enter into the collective bargaining agreement" and since "the parties relied on the corporate entities as they existed at the signing of the contract." *United Paperworkers* v. *Penntech Papers*, 439 F. Supp. 610, 621 (D. Me. 1977), aff'd *sub nom. United Paperworkers* v. *T.P. Property Corp.*, 583 F.2d 33 (1st Cir. 1978).

2. The Union also filed unfair labor practice charges with the Board, alleging that petitioners and Kennebec had violated their obligation to bargain over the effects of the decision to close the Kennebec mill. The Board, affirming the administrative law judge, found that petitioners and Kennebec constituted a single employer of the Madison, Maine, mill workers, and that they had violated Sections 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by refusing to bargain over the effects of the mill closure. Pet. App. 22a-24a, 73a-83a. In concluding that petitioners and Kennebec constituted a single employer, the Board relied (*id.* at 83a) on their "common management," "centralized control of labor relations," "[c]ommon ownership and interrelation of operations."

The Board rejected petitioners' contention that principles of res judicata or collateral estoppel based on the Unions' prior Section 301 suit precluded a single employer finding. Pet. App. 22a-23a. The Board explained (*ibid.*; footnote omitted):

> In [the prior] suit, under Section 301 of the Labor Management Relations Act, the district court applied Federal common law and held that the separate corporate existence of Penntech and T.P. Property would not be ignored in order to compel them to join Kennebec in the arbitration of a dispute under a bargaining agreement to which they were not signatories. In affirming this holding, the circuit court stated:
>
> > We also agree that the real issue in this case is * * * whether parent corporations should be bound to the collective-bargaining agreements of their subsidiaries. * * *
>
> However, the present proceeding * * * is not controlled by Federal common law and the issue is not the enforceability of the provisions of a specific bargaining

agreement. On the contrary, the Board's test is, as stated with approval by the Supreme Court in *Radio & Broadcast Technicians Local 1264* v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965):

> [I]n determining the relevant employer, the Board considers several nominally separate business entities to be a single employer where they comprise an integrated enterprise * * *. The controlling criteria, set out and elaborated in Board decisions, are interrelation of operations, common management, centralized control of labor relations and common ownership.

An examination of these criteria was not the basis for the holdings in the aforementioned court proceedings. Accordingly, due to the lack of identity in either the cause of action or the respective issues involved, it is manifest that the principles of *res judicata* and collateral estoppel do not apply.

Accordingly, the Board ordered petitioners, *inter alia*, to bargain with the Unions about the effects of the decision to close the Kennebec mill. Pet. App. 31a.

3. The court of appeals upheld the Board's decision and enforced its order. Pet. App. 1a-19a. The court agreed with the Board that the doctrine of collateral estoppel did not preclude the Board's single employer finding because the issues whether companies constitute a single employer for the purpose of imposing a bargaining obligation under Section 8(a)(5) of the Act and whether a signatory company is the alter ego of a nonsignatory company, so that the latter is bound by the collective bargaining agreement of the former in a Section 301 proceeding, are "conceptually distinct" and turn on different facts. Pet. App. 10a-11a. The

court also noted (*id.* at 11a n.3; emphasis added) that in *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272, 286 (1972), this Court had "distinguished between the *statutory* obligation to bargain with the union under Section 8(d) of the Act and the *contractual* obligations normally enforced through an action to compel arbitration under Section 301, emphasizing that the latter obligations arose as a result of the mutual agreement of the parties."

On the merits, the court concluded (Pet. App. 15a, 18a) that the Board's findings both that "Penntech and its wholly-owned subsidiaries, T.P. and Kennebec, constitute a single employer within the meaning of section 2(2) of the Act," 29 U.S.C. 152(2), and that the employer had violated its duty to bargain about the effects of the decision to close the Kennebec plant were "supported by substantial evidence."

ARGUMENT

Petitioners no longer phrase their argument in terms of collateral estoppel, but rather contend (Pet. 8) that "a parent corporation has [no] duty to bargain with the employees of its wholly-owned subsidiary over issues it is not obligated to arbitrate." Petitioners' claim that its duty to bargain under the Act must be coextensive with its duty to arbitrate determined in a Section 301 proceeding, however, founders for the same reason that its collateral estoppel argument failed: the issues involved in the two proceedings are significantly different.

This Court has made clear that whether a party has a duty to bargain under the Act is a separate and distinct question from whether it is obligated to honor the terms of a collective agreement. For example, in *Allied Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 188 (1971) (footnote omitted), the Court held that "[t]he remedy for a unilateral mid-term modification of a permissive term [of a collective bargaining agreement] lies in an action for breach

of contract, * * * not in an unfair-labor-practice proceeding." In so ruling, the Court explained that Congress had rejected provisions that would have made contract violations an unfair labor practice on the ground that " '[o]nce parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board." *Id.* at 186-187, quoting H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 42 (1947). Similarly, in *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272, 281-282 (1972), the Court held that "[i]t does not follow * * * from [a successor employer's] duty to bargain that it was bound to observe the substantive terms of the collective-bargaining contract the union had negotiated with [the predecessor] and to which [the successor] had in no way agreed." The Court pointed out (*id.* at 287) that the contractual issue turns on whether the successor "had agreed or must be held to have agreed to honor [the] collective-bargaining contract," while the obligation to bargain under the Act is not based on the consent of the parties. Most recently, in *Jim McNeff, Inc.* v. *Todd*, No. 81-2150 (Apr. 27, 1983), the Court upheld the right of a union to enforce, by way of a Section 301 suit, monetary obligations incurred by an employer under a prehire agreement in the absence of proof that the union represented a majority of the employees, notwithstanding the fact that an employer has no obligation (indeed, no right) under the Act to bargain with a minority union. The existence of a contractual duty thus does not necessarily give rise to a statutory obligation, nor does a violation of the Act necessarily constitute a breach of contract.[3]

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[3]Petitioners' reliance (Pet. 11) on *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543 (1964), is misplaced. In *Burns, supra*, 406 U.S. at 286-287, the Court held *Wiley* inapposite to the determination whether an obligation to honor a pre-existing collective bargaining agreement was encompassed in the statutory obligation to bargain on the ground

Accordingly, petitioners' assertion (Pet. 11) that "there is no policy justification for imposing on parent corporations different obligations depending on whether an action is brought pursuant to Section 8(a)(1) and (5) as opposed to Section 301" is unfounded. The justification plainly arises from the fact that the obligations imposed by Section 8(a)(5) are distinct from those that flow from contractual agreements.[4]

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that, by contrast to *Wiley, Burns* "does not involve a § 301 suit; nor does it involve the duty to arbitrate." 406 U.S. at 286.

DelCostello v. *Teamsters*, No. 81-2386 (June 8, 1983) (Pet. 12), also is irrelevant to the question presented here, since that case involved the entirely different question of what statute of limitations should apply to a "hybrid" suit by an employee alleging that his employer had breached the collective bargaining agreement and that his union had breached its duty fairly to represent him by mishandling the ensuing grievance arbitration proceedings. Moreover, to whatever extent the " 'similarity of rights' asserted in Section 301 suits and unfair labor practice actions" (Pet. 12, quoting *DelCostello, supra*, slip op. 18) may have contributed in *DelCostello* to the Court's "borrowing" the six-month statute of limitations contained in Section 10(b) of the National Labor Relations Act, 29 U.S.C. 160(b), that factor alone cannot require a no alter ego finding in the Section 301 context to preclude a single employer finding in a subsequent Section 8(a)(5) proceeding. In any event, "straightforward" Section 301 suits against the employer for breach of the collective bargaining agreement brought by the union itself rather than by an individual employee are governed by the applicable state statute of limitations, not by 29 U.S.C. 160(b). See *DelCostello, supra*, slip op. 10; *Auto Workers* v. *Hoosier Cardinal Corp.*, 383 U.S. 696 (1966).

[4]Petitioners' assertion (Pet. 10) that enforcement of the Board's order allows the Unions to "obtain the same result" they unsuccessfully sought in the prior Section 301 suit is incorrect. In the prior action, the Unions attempted to compel petitioners to participate in an arbitration proceeding arising from Kennebec's failure to fulfill a panoply of obligations imposed by the collective bargaining agreement in the event of permanent closure. Specifically, the Unions sought to compel pension fund payments and "termination benefits arising from the agreement." *United Paperworkers* v. *Penntech Papers, Inc., supra*, 439 F. Supp. at

Carpenters Local No. 1846 v. *Pratt-Farnsworth, Inc.*, 690 F.2d 489 (5th Cir. 1982) (Pet. 12), is not to the contrary. Indeed, the court there emphasized (690 F.2d at 508-509) the different criteria underlying the alter ego and single employer theories. Hence, that decision provides no support for petitioners' position that the finding in the Section 301 context that Kennebec was not the alter ego of petitioners—upheld by the same court of appeals that upheld the Board's order here—precluded the conclusion in a subsequent unfair labor practice proceeding that petitioners and Kennebec were a single employer.[5]

Petitioners' additional contention (Pet. 9) that it is improper for the Board to base single-employer status on a parent-subsidiary relationship misconceives the test applied by the Board. The Board's conclusion that petitioners and Kennebec were a single employer was not grounded on the mere fact that Kennebec was a subsidiary of petitioners. Rather, the Board relied on the existence of facts that showed that petitioners and Kennebec enjoyed "common management," "a centralized control of labor relations," "common ownership and interrelation of operations." Pet. App. 23a, 83a. This Court approved the use of these criteria

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615. By contrast, the Board's order simply requires petitioners to negotiate over the effects of closure; no particular subject matter for the negotiations is dictated. Pet. App. 26a, 92a-93a.

[5]In *Florida Marble Polishers Health & Welfare Trust Fund* v. *Edwin M. Green, Inc.*, 653 F.2d 972, 975 (1981) (Pet. 12-13), the Fifth Circuit, citing the test approved in *Radio & Television Broadcast Technicians Local 1264* v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965), simply upheld the district court's factual determination that two separate corporations did not constitute a single employer where the two entities operated independently of each other. Similarly, in *Tishman Corp.* v. *Elevator Constructors*, 92 L.R.R.M. 2705, 2708 (S.D.N.Y. 1976) (Pet. 13), the district court found that the parent corporation and its subsidiary were not "so interrelated as to constitute a single employer."

in determining single-employer status in *Radio & Television Broadcast Technicians Local 1264* v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965).[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6]Petitioners assert (Pet. 8 n.*) that the Board's finding of a single employer, which was upheld by the court of appeals, is not supported by substantial evidence. That purely evidentiary issue, however, does not warrant review by this Court. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951). In any event, as the Statement (pages 2-4, *supra*) makes clear, the Board's conclusion is amply supported by the evidence.

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